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In The

Supreme Court of the United States

October Term, 1979

No. 79-1640

BOROUGH OF MOUNT EPHRAIM,

Respondent,

vs.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants/ Petitioners.

RESPONDENT'S MOTION TO DISMISS AND AFFIRM THE LOWER COURT DECISION

and

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR CERTIFICATION

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Borough of Mount Ephraim v. 613 Corporation et al. 1a

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Borough of Mount Ephraim, respondent, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Jersey and the Superior Court of the State of New Jersey, Appellate Division, on the grounds hereinafter set forth.

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, the Borough of Mount Ephraim, respondent herein, files this brief in opposition to the appellant's petition for a writ of certiorari to the Supreme Court of New Jersey.

OPINIONS BELOW

The petitioners were charged in the Borough of Mount Ephraim with the use of the premises of 613 Corporation in the form of live nude dancing as being in violation of the Borough Zoning Ordinance, Section 99-15B (this ordinance is set forth in full in the petitioners' brief). At the time that this matter was presented to the Municipal Court, there was a stipulation of seven issues and six factual statements between counsel for the appellants and respondent. This stipulation of issues is set forth in the respondent's appendix, which contains certified portions of the record below which are additional to those filed by the petitioner. Remaining from the original seven issues are numbers two and three.

An opinion was rendered by the Mount Ephraim Municipal Court, which was then reviewed and heard *de novo* on the record by the Camden County Court. In that court, certain convictions were reversed and others affirmed. The respondent disagrees with the statements of the petitioners as to the findings of the courts below in that certain issues presently raised by the petitioners were not raised below notwithstanding the fact that the petitioners have consistently raised these arguments in their briefs to each of the four courts which have previously reviewed this case.

The opinion of the Camden County Court was affirmed by the Superior Court of New Jersey, Appellate Division, for the reasons expressed below.

The Supreme Court of New Jersey declined to issue a writ of certiorari to the Superior Court of New Jersey, Appellate

Division and by virtue of Rule 2:12-9 of the Rules of the Courts of the State of New Jersey, the denial of that writ automatically served as a dismissal of the appeal.

JURISDICTION

I. The review before this Court is not that of the proper lower court.

Respondent disagrees with the statement of jurisdiction found in the appellant's petition by reason of the petitioner's failure to comply with 28 U.S.C. §2057(2) or in the alternative, §2057(3). The law is clear that the Supreme Court of the United States can only review a final judgment or a decree rendered "by the highest Court of a State in which a decision could be had." This does not mean that only the highest court in a State can be reviewed. This has been interpreted many times to mean that in the event that the highest court of the State declines to exercise its authority, the judgment of the intermediate court, rather than the order of the refusal of the higher court is the judgment reviewable under 28 U.S.C. §2057. Decisions thought to sustain this proposition are *Michigan-Wisconsin Pipeline Company v. Calvert*, 347 U.S. 157, 160 (1953) and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1967). In the case *sub judice*, the last decision was that of the Superior Court of New Jersey, Appellate Division. The Supreme Court of New Jersey declined to issue a writ of certiorari to the Superior Court of New Jersey, Appellate Division and by virtue of that ruling, New Jersey Court Rule 2:12-9 effects an automatic dismissal of the appeal. Therefore, the proper review would be that of the Superior Court of New Jersey, Appellate Division and not that of the Supreme Court of the State of New Jersey. Accordingly, it is respectfully submitted by the respondent, that this Honorable Court does not have jurisdiction in the within matter.

II. Issues raised before this Court were not properly raised below.

The respondent also submits that one issue raised by the petitioners before this Court, namely whether the relevant zoning ordinance of the respondent effects a denial of the petitioner's rights of due process was not properly raised below. The law is clear that once a case reaches this High Court, that review is limited to the specific federal questions that were properly raised in the state courts. *Whitney v. California,* 274 U.S. 357, 362-3 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-8 (1899); *State Farm Mutual Insurance Company v. Duel,* 324 U.S. 154, 160-1 (1945).

While the petitioner sets forth on page six as part of its procedural history the raising of the due process argument in its brief to the Municipal Court, this issue was not one of the seven issues stipulated by and between the parties; and further, briefs before the state courts are not ordinarily part of the record filed with the United States Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Association v. Railroad Commission,* 269 U.S. 354, 357-8 (1926); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54 (1934). Because this issue was not raised below, no evidence upon this issue was produced. The due process argument relates to a nexus being established between the ordinance and the objectives furthered by that ordinance. There is nothing in the record on this issue as it was stipulated not to be an issue by virtue of its omission from the seven issues as agreed.

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Borough of Mount Ephraim Zoning Ordinance, Section 99-15B as set forth in the petitioners' brief and the First Amendment to the Constitution of the United States are the ordinances and constitutional provisions involved in the within matter.

Rule 2:12-9 of the Courts of New Jersey provides:

> "Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders."

QUESTIONS PRESENTED

Is petitioner's live nude dancing protected by the First Amendment of the United States Constitution and has the Borough of Mount Ephraim engaged in selective enforcement of its zoning ordinance?

The respondent disagrees with the questions presented by the petitioners in that the petitioners sets forth issues far broader that those raised earlier in these proceedings. The stipulated questions were whether the municipality, in the present factual context, may prohibit the petitioners' live nude dancing, and whether such enforcement of the zoning ordinance has resulted in selective enforcement as applied to the petitioners.

STATEMENT OF THE CASE

A. Statement of the Facts

The respondent adopts the statement of the facts as set forth in the petitioners' brief.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann Di Luciano with the use of the premises of 613

Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance Section 99-15B. At that time, counsel for the respective parties entered into a stipulation of seven legal issues and six factual statements which are set forth both in the opinion of the Camden County Court at page 6a of the appendix of the petitioners' brief, as well as in the additional certified portion of the record attached to this brief. The Municipal Court of the Borough of Mount Ephraim found the defendants guilty of the various charges, including violation of the Borough's zoning ordinance.

With respect to the six stipulated facts, the parties failed to agree on number 4 and testimony was taken in the Municipal Court from the Chief of Police and Building Inspector of the Borough of Mount Ephraim on the issue of the Borough's alleged selective enforcement of the zoning ordinance, along with testimony on the issue of whether other forms of live entertainment in the Borough were either nonconforming or accessory uses. No other testimony was produced by either party. It is important to note this because the next level of review from a Municipal Court is a trial *de novo* upon the record in the County Court. The record that is made in a Municipal Court cannot be supplemented nor even remanded for further findings by the reviewing court. Facts not presented in the Municipal Court have no way of finding their way into the record of the County Court. Accordingly, the seven issues mentioned above were the only issues before the Municipal Court and are necessarily the only issues that can properly come before any reviewing court. [The nature of *de novo* review is fully detailed in *State v. Johnson*, 42 N.J. 146 (1964).]

The petitioners filed a notice of appeal which was heard by the Camden County Court. That court held that there was no selective enforcement of the Borough's zoning ordinance, nor did it offend the First Amendment.

The Superior Court of New Jersey, Appellate Division, reviewed the opinion and record before the Camden County

Court and affirmed the opinion of the Camden County Court essentially for the reasons contained in that opinion.

The New Jersey Supreme Court declined to grant the petitioners-appellants' petition for certification which by virtue of New Jersey Court Rule 2:12-9, also effected an automatic dismissal of the appeal.

Accordingly, remaining from the original seven issues are issues number 2 and 3 on the stipulation constituting respondent's appendix. Issues number 4, 5, 6 and 7 all relate to a sign ordinance not related to this appeal.

ARGUMENT

I.

The petitioners' appeal should be dismissed, or in the alternative, the decision of the state court should be affirmed pursuant to Supreme Court Rule 16 by reason that the appeal is not within the jurisdiction of this Court, because it was not taken in conformity to statute.

As set fourth in the jurisdictional statement of this brief, the respondent believes that this Court does not have jurisdiction.

II.

Petitioners' appeal should be dismissed pursuant to Supreme Court Rule 16(1)b on the ground that it does not present a substantial federal question.

The respondent's position is that the alleged federal issue on the First Amendment is not substantial because the prohibition of live nude entertainment is a valid exercise of the police power of the municipality; the ordinance is not aimed at suppressing speech, but is designed to regulate land use within the Borough's

boundaries. Parenthetically, there is no contention on the part of the respondent that if live nude dancing were permitted, it would be obscene.

The issue before this Court is whether the petitioner has an absolute and unqualified right to present live nude dancing in the Borough of Mount Ephraim; the First Amendment only comes into play as an incidental issue as to whether the zoning ordinance is constitutionally defective because it runs afoul of the First Amendment of the United States Constitution. This Court's prior holdings indicate that live nude dancing is not entitled to the prophylatic protection afforded pure speech. In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), this High Court was faced with the issue of the validity of the zoning ordinance of the City of Detroit, which required adult theaters to be disbursed throughout the city. In *Young*, the city zoning ordinance differentiated between "adult" theaters and those theaters which were not. The Court, noting that there was no denial of access to the market by reason of the zoning ordinance held, at page 320:

> "we are not persuaded that the Detroit Zoning Ordinance will have a significant deterrent effect on the exhibition of films protected by the First Amendment."

The Court went on to say, at page 321, that:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

The thrust of *Young* is that a community clearly has the right to regulate its own affairs and what takes place within its boundaries. This includes the presentations of movies, all movies, including obscene movies. Petitioner has filed to prove

that the Zoning Ordinance of the Borough of Mount Ephraim will deny the petitioner's access to the market, or that the intended use is uniquely appropriate to this location.

In *California v. La Rue*, 409 U.S. 109 (1972), the Court was faced with the issue of whether the California Department of Alcoholic Beverage Control had the authority to suspend or revoke any license if it determined that it was contrary to public welfare and morals.

The Court found that the California ABC had such authority and that the regulation was rationally related to the public good. The rationale of *La Rue* was that the ordinance was licensing not a controlling of obscenity, which are the same facts and issues as the case at bar. It further held that the State was not limited to approaching nude dancing on First Amendment grounds alone.

Chief Judge Cohen of the District Court of New Jersey, in his opinion of *Starshock, Inc. v. Shusted*, 370 F. Supp. 506 (D. N.J. 1974), *reversed on other grounds*, 493 F. 2d 1401 (3rd Cir. 1976), was faced with the issue of "is nude interpretive dancing embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution." page 507.

The court held at page 508:

> "plaintiffs fail in their argument to note the significant distinction between speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather these acts are conduct cognizable as a crime under the common law (citations omitted) and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the legislature."

The court further noted at page 509 that:

> "The United States Supreme Court has consistently recognized the distinction between conduct, which may be regulated by the State, and expression, which may not be interfered with except upon proof of obscenity, *Miller v. California,* 413 U.S. 15 (1973)."

Starshock clearly stands for the proposition that nude dancing is not within the First Amendment. Put simply, petitioners' nude dancing is not speech; and hence is not entitled to the protections afforded speech.

Respondent's contentions are further bolstered by looking at the matter that is presently being sold, that is, books, magazines, movies and sexual paraphernalia by the petitioners. What is being regulated is not free speech but activities and conduct that is to take place in the municipality. Live entertainment is available throughout Camden County as is nude dancing in certain locations. Because the Borough of Mount Ephraim has elected not to allow live entertainment within its boundaries cannot give petitioners a bootstrap argument that this violates its First Amendment rights. Parenthetically, it should be noted in the context of prior restraint that the petitioners offered live entertainment, and this action only arose after such entertainment was offered. Accordingly, there can be no question that the Borough of Mount Ephraim did not prevent the initial acts of the petitioners.

As in *Young, supra,* there is no suppression of free speech reflected by the enforcement of the Borough's ordinance.

Much of the petitioners' grounds for establishing the substantiality of the federal question is based upon a due process argument. The due process argument was never properly raised

below and the respondent never had an opportunity to introduce evidence on that issue. Accordingly, it is not before this Court and this Court respectfully does not have jurisdiction to entertain this issue.

III.

The petitioners' appeal should be dismissed pursuant to Supreme Court Rule 16(1)b by reason that the federal question sought to be reviewed as to denial of due process, was not properly raised below.

This is discussed in the jurisdiction section of this brief, found on page 4.

Additionally, this Court has long held that in order for the Supreme Court of the United States to sustain jurisdiction on direct appeal, a substantial federal question must have been involved in the prior state court proceedings. As early as 1878, Chief Justice Waite stated: "It is not enough that a Federal question may have been raised. We have no jurisdiction unless it was actually raised and either decided or necessarily involved the judgment pronounced." *Hager v. California,* 24 L. Ed. 1044, 154 U.S. 639 (1878). Later decisions of this Court have reaffirmed this position. *Anonymous v. Baker,* 360 U.S. 287, 3 L. Ed. 2d 1234, 79 S. Ct. 1157 (1959). In *Arlans Department Store of Louisville Inc. v. Kentucky,* 371 U.S. 218, 9 L. Ed. 2d 264, 83 S. Ct. 277 (1962), this Court, in a *per curiam opinion,* held that the Sunday Closing Law for retail stores did not pose a substantial federal question even though appellants argued a denial of First Amendment freedoms in that case.

IV.

The petitioners' petition for certiorari should be denied pursuant to Supreme Court Rule 19 because there are neither special nor important reasons for the granting of such a writ.

Rule 19 of the Rules of the Supreme Court provide that "a review of Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore." The respondent submits that such reasons do not exist.

This Court has consistently denied petitions for writs of certiorari where constitutional attacks on ordinances or statutes were raised for the first time on appeal. *Monks v. New Jersey,* 90 S. Ct. 1563, 398 U.S. 71, 26 L. Ed. 2d 572 (1970), *Cardinal v. Louisiana,* 89 S. Ct. 1162, 394 U.S. 437, 22 L. Ed. 2d 398 (1969). In *Monks,* the petitioner argued, for the first time before this Court, that a New Jersey statute was unconstitutional as applied to him. The Court held that the lower courts had no opportunity to review this contention and dismissed the writ of certiorari as having been previously improvidently granted.

The only reasons advanced by the petitioners for granting certification are the mouthing of violations of constitutional safeguards. The mere incantation of violation of constitutional safeguards cannot give rise to the issuance of a writ of certiorari. As set forth in Point II of this memorandum, the court's decision below is entirely consistent with the dictates of the Supreme Court.

CONCLUSION

For the reasons set forth herein, respondent respectfully prays this Honorable Court to dismiss appellants' appeal and deny petition for writ of certiorari.

Respectfully submitted,

s/ Arnold N. Fishman
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Attorney for Respondent

APPENDIX

BOROUGH OF MOUNT EPHRAIM v. 613 CORPORATION ET AL.

Issues

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone?

2. Is defendants' live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must defendant secure a permit to repaint the sign with a new legend?

6. May defendant replace the old legend from its obliterated non-conforming sign?

7. Must defendant secure a permit to return the old legend?

Facts

1. Defendant opened for business at its present location in a C Zone in the Borough of Mount Ephraim in June, 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphenalia as well as having coin-operated movie peep shows.

3. In July, 1976, defendant commenced offering live nude dancing.

Borough of Mount Ephraim v. 613 Corporation et al.

4. Both the Chief of Police and Building Inspector of the Borough of Mount Ephraim will testify that all other entertainment in the C Zone of the Borough of Mount Ephraim is by way of non-conforming use.

5. Also, in July, 1976 defendant obliterated the legend from its existing non-conforming sign without obtaining a permit.

6. The Judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.